***United States Court of Appeals***

***for the Second Circuit***

# APPELLANT'S BRIEF

# 77-1298

*To be argued by*
THOMAS J. O'BRIEN

ORIGINAL

In The

## United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

-against-

ROBINSON QUINONES,
*Defendant-Appellant.*

*On Appeal from the United States District Court for the Eastern District of New York.*

# BRIEF FOR DEFENDANT-APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
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UNITED STATES OF AMERICA,

-against-

ROBINSON QUINONES,

Defendant.

----------X

## QUESTIONS PRESENTED

1. Whether the evidence seized by FBI from the Hilton Hotel should have been suppressed?

2. Whether the confession made by the co-conspirator, Frank Tillman Lewis, after his arrest was admissible at the separate trial of Robinson Quinones?

3. Whether the court erred in permitting FBI Agent Farrell to testify regarding the out of court identification made by various eye witnesses?

4. Whether the court erred in failing to grant a mistrial when an eye witness not presented at the Wade Hearing identified the defendant in court?

5. Whether the admission of two firearms and a sawed off shotgun which were unconnected to the bank robbery was error?

6. Whether the prosecutor's questions regarding other

crimes denied the defendant a fair trial?

## PRELIMINARY STATEMENT

The defendant, Robinson Quninones was indicted together with Frank Tillman Lewis and charged with bank robbery and conspiracy in violation of 18 U.S.C. §371, 2113 (a) (d) and 2.

The co-defendant, Frank Tillman Lewis was tried separately and convicted prior to Robinson Quinones's trial.

Robinson Quinones was also convicted after trial and sentenced to 25 years imprisonment.

## STATEMENT OF FACTS

### Government's Case

On January 3, 1977 shortly after 9 a.m. the Barclay Bank at Flatbush and Church Avenues in Brooklyn was robbed of $11,822 by two armed men. One man stayed near the entrance to the bank while the other vaulted the teller's counter to get the money. Mrs. Santiago, a teller called as a government witness did not identify Mr. Quinones as one of the robbers. (TR 29-42, 265)

Mr. Davis, the bank guard, testified to the facts of the robbery and stated that the man who vaulted the counter disarmed him and kept his .38 calibery revolver, serial number SWD 270305. He then identified Government Exhibit "8"

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TR-Transcript of Trial Minutes.
H-Transcript of Hearing Minutes.

as the gun taken from him during the robbery. (TR 125-130) He stated that he saw the face of the man who took his gun for a minute. When asked to make an in court identification he said:

> A: "Well, the man who is sitting at the table there. But the only thing, his picture looks just like him, but I'm not sure.
>
> Q: You're not certain?
>
> A: Around his eyes or his hair and his hat, it look just like him. But I'm not sure." (TR 132-133)

Defense counsel moved for a mistrial on the grounds that the witness was not offered as an identification witness at the Wade hearing had before trial. The court denied the motion stating, "He didn't identify him from the photograph." (TR 134)

On cross examination, Mr. Davis testified that he was shown photographs by FBI Agent Farell on two occasions - once in January and the second time a month before the trial. He said that the first time he was shown an array of photographs (which included the defendant's picture) he was unable to identify anyone, but that he identified the defendant the second time. (TR 136-139)

On redirect the witness contradicted himself and said that he was unable to make an identification on both occassions of being shown photographs. (TR 139-140)

Thereafter the court stated it had committed an error in admitting the identification testimony but found that the error was harmless stating:

> "because his testimony was quite spontaneous that he was not making the identification from any photograph he previously looked at. He remembered the face of the individual he saw in the courtroom." (TR 147-148)

Mr. Brown testified that he was a customer at the bank during the robbery. He testified that he followed the robber who stood at the entrance out of the bank after the robbery. He saw this man who was joined by a second man on Flatbush Avenue enter a white Cadillac limousine. He copied down the license plate number 993ZAO. Mr. Brown did not identify the defendant Robinson Quinones. (TR 168-179)

It was stipulated that a white Cadillac limousine bearing license plate number 993ZAO was owned by Park Ridge Limousine. On January 3, 1977 that vehicle was rented by a person who telephoned and identified himself as Mr. LaRossa (TR 142-143)

Richard Casciano testified that he drove the white Cadillac for Park Ridge Limousine on January 3, 1977. He drove a man who identified himself as Mr. LaRossa and another man he knew from a previous trip as Mr. Lovell to Flatbush Avenue near the intersection of Church. They exited the car and returned about five (5) minutes later. He then drove them to the intersection of 8th and Carroll where he left

them at approximately 9:20 a.m. (TR 42-50) When asked whether he could identify the man he knew as Mr. LaRossa, Mr. Casciano said:

> "That looks--I think I see him sitting over there with the green jacket." (TR 53)

The prosecutor then asked:

> "Mr. Casciano, you say you think it's the gentleman there. Can you be any more positive than that?"

Mr. Casciano replied:

> "Well, its been so long." (TR 53)

Arnold Gurevitz testified that he was employed as Director of Security at the Conover Hotel in Miami, Florida. The hotel records indicated that one Kenneth A. Smith and T. LaRossa registered at that hotel on January 4, 1977 and checked out on January 13, 1977. (TR 68-75). He also identified the defendant as a person he remembered being in Florida (TR 83) but he did not know whether he used the name LaRossa. (TR 87-91)

FBI Agent Henehan testified that when he arrested the defendant at Apartment 3B, 284 Atlantic Avenue, Brooklyn, the defendant said "Admit it man, I'm the best." (TR 191) On cross examination he admitted that he puts all significant pieces of information or evidence into his 302 reports. That he considered the statement of the defendant significant, but that he did not put it into his 302 report nor did he tell anyone else about the statement until immediately

before trial. (TR 191-193)

Bank surveillance photographs depicting a robber with a complete face mask were introduced into evidence during the testimony of FBI Agent Farrel. (TR 199) Agent Farrell testified, over objection, that Mr. Casciano selected a photograph of Frank Tillman Lewis as the person he knew as Mr. Lovell, the other person in the limousine and that Mrs. Sharp also selected a photograph from the same photo array shown to Mr. Casciano. The court did not allow the witness to state which photo she selected but it was obvious that she selected Mr. Lewis, who was the only defendant in the array. (TR 199-204) He was also permitted, over objection, to testify that Mr. Casciano and Mrs. Boyer both picked a photograph of the defendant Quinones, as the man he knew as Mr. LaRossa and the man she saw at the Hilton. (TR 219-222)

Agent Farrell further described the arrest of Mr. Lewis at a room in the Hilton Hotel which was registered to Kenneth A. Smith and Thomas LaRossa. Evidence seized from the room including a .38 caliber pistol and a Mauzer .25 caliber pistol [1] and photograph of the defendant Quinones[2] were introduced into evidence over defense objections. (TR 208-217)

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1. Prior balistic testimony established that the .25 caliber pistol was one of the guns used in the robbery. (TR 103-111)

2. The photograph of Mr. Quinones established him as a suspect and led to all other evidence.

Defendant's Case

Frank Tillman Lewis, the alleged co-conspirator, who was convicted at a trial held prior to the defendant's trial, was the sole witness called by the defense.

He testified that he was convicted of robbing the Barclay Bank on January 3, 1977. He said that he arrived at Flatbush and Church Avenues by a limousine he rented from Park Ridge Limousine Service using the name LaRossa. He said that he was accompanied by a man named Jose who he knew for two weeks. (TR 313-314)

He testified that he knew the defendant, Quinones and his family for ten (10) years. That Quinones was not with him at either Flatbush and Church Avenues or in the white Cadillac limousine. (TR 314, 320) He testified, however, that Mr. Quinones accompanied him to Florida on January 4, 1977 under reservations he made under the names Kenneth Alan Smith and T. LaRossa. (TR 314-316)

He testified that Mr. Quinones had no knowledge of the bank robbery and used the name LaRossa at his suggestion to protect his other associates. When Mr. Quinones became curious as to why he was using the name LaRossa, Mr. Lewis told him that "its best if we travel under aliases". Mr. Lewis paid all the expenses and brought Mr. Quinones along as his assistant and personal valet. Upon their return from Florida he registered Mr. Quinones and himself at the

New York Hilton under the names of LaRossa and Smith. (TR 316-319)

## ARGUMENT

## POINT I

## EVIDENCE SEIZED BY THE FBI FROM THE HILTON HOTEL SHOULD HAVE BEEN SUPPRESSED

On January 14, 1977 the FBI was advised by a member of the N.Y.C. Police Department that Mr. Lewis and Mr. Quinones were registered in Room 2690 of the N.Y. Hilton Hotel using the names Kenneth A. Smith and Thomas LaRossa. (H-17-18) When they arrived at the Hilton on that day the FBI Agents had an arrest warrant for Mr. Lewis for the bank robbery, but they did not have an arrest warrant for Mr. Quinones. (H-18, 21-22)

Agent Farrell testified on direct that the N.Y.C. police had an arrest warrant for Mr. Quinones on another charge. (H-22) On cross he said he did not know whether the police had a warrant. (H-185) In any event no law enforcement agent possessed a search warrant for the room.

The FBI Agents knocked on the door of room 2690 and said:

> "Frank Tillman Lewis, the FBI. Your under arrest."

Mr. Lewis answered:

> "I'm coming out. I have a girl with me." (H-25)

When one of the agents pushed the door in Mr. Lewis was standing there with a girl shielding him. "One of the agents reached in and grabbed the girl and pulled her out behind in the hallway. And we grabbed Mr. Lewis and pulled him out and I passed him out behind me and on the floor and to an agent behind me who searched him and handcuffed him at that point." (H-26)

Believing there was another individual in the room, the agents entered the room and searched the entire room including the closet, under the bed and the bathroom. (H-27) Nothing was found as a result of that search. (H-195-197) After the search, Mr. Lewis was brought back into the room, placed on the bed and given Miranda warnings. (H-27) He was then asked whether he had any gun to which he allegedly replied "There is one under the bed and one in my attache case." (H-28)

Agents thereafter retrieved two pistols from under the bed and in the attache case. (H-29-31, 34-35) One of the pistols was later proven to be the gun taken from the bank guard and the other the one fired during the robbery.

The Agents then brought Mr. Lewis to the office of the FBI and the N.Y.C. Police Department remained in the room awaiting Mr. Quinones return. (H-37-38)

At the conclusion of the suppression hearing, the court denied the defendant's motion to suppress. (H-285-287)

Standing

The defendant, Robinson Quinones, had standing to challenge the search made of the hotel room where he was registered at the Hilton.

The leading standing cases involving traditional searches and seizures are Jones v. United States 362 U.S. 257 (1960) and Brown v. United States, 411 U.S. 223 (1973). The synthesis of these cases to the extent here relevant, is that a defendant has standing where he claims that he had a proprietary or possessary interest in the premises searched.

Under the facts herein the defendant had at least a possessary interest in the hotel room at the time of the search.

Baker v. United States, 401 F2d 958, 980 (D.C. Cir. 1968) fully supports our position. There the defendant had a key to the hotel suite of one Black and was welcome to use it at any time. He frequently used the suite and its telephone. Unknown to the defendant Baker, the suite had been "bugged". All of the defendant's own conversations were suppressed by the district court. On appeal, defendant further argued that all conversation should have been suppressed, even if he was not present. Id. at 982. Following Jones v. United States, 362 U.S. 257 (1960), the court agreed with the defendant stating Id. at 983:

> "Appellant's interest in the Black suite warranted his expectation of freedom from governmental intrusion. . ."

Spinelli v. United States 382 F2d 871 (8th Cir. 1967), reversed on other grounds, 393 U.S. 410 (1969) is directly on point. There the court held that it was the right to use the premises, rathern than ownership, that determines whether a person is aggrieved by an unlawful search.

Search Incident to an Arrest

Although we concede that the arrest of Frank Lewis was lawfully made pursuant to an arrest warrant, we maintain that the search of the hotel room after the arrest was outside the area authorized by the search.

A search incident to an arrest must be limited to the person of the arrestee and the area into which he might reach for a weapon or to destroy evidence. Chimel v. California 395 U.S. 752, (1969). The court in Chimel confined the area to be searched as follows:

> "[I]t is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control' -construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."

> "There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant."

See also United States v. Griffith 537 F2d 900 (7th Cir. 1976) where the court held, in reliance upon Chimel, that a search made incident to an arrest, of a bathroom, suitcase, and brown paper bag was illegal since those searches were not within the area from within which the defendant might gain possession of a weapon or destructible evidence.

The manner, method and extensiveness of the search must be reasonably calculated to achieve the seizure of those objects and no more. Sibron v. New York 392 U.S. 40 (1968); Terry v. Ohio 392 U.S. 1 N. 28.

Under our fact it is undisputed that the Agents arrested Mr. Lewis and brought him out of the hotel room. They then searched the room and found nothing. Thereafter they brought Mr. Lewis back into the hotel room and conducted a second search. Simply stated such a search cannot be justified as incident to a lawful arrest.

CONSENT SEARCHES

Consent searches constitute the second major exception to the warrant requirement. To establish the validity of a consent search, however, the prosecution must establish that the consent was given voluntarily. Amos v. United States

255 U.S. 313 (1921); Judd v. United States 190 F2d 649 (D.C. Cir. 1951).

To determine whether the consent was voluntary, the courts generally have applied a "totality of the circumstances test". The issue is whether the consent was given in an exercise of free will or whether it was given in acquiescence to or in peaceful submission to an exersion of authority to the police. Because the determination depends upon a particular defendants state of mind, generalization is not too helpful but a few recurring fact patterns may be noted. That the defendant is under arrest, even though lawfully, may be enough in itself to invalidate a subsequent consent to search. Judd v. United States, supra; Channel v. United States 285 F2d 217 (9th Cir. 1960).

Similarly, the purported consent is involuntarily if it is given in reply to an exertion by the policeman that he has authority to search when he in fact does not. Bumper v. North Carolina 391 U.S. 543, (1968).

The recognition that many persons accused of a crime are ignorant of their rights and consent because they believe they have no alternative have lead some courts to hold that consent to search is not effective unless the person giving consent is first informed of his rights to withhold the consent. United States v. Nikrasch 367 F2d 740, (7th Cir. 1967); United States v. Moderacki 280 F. Supp. 633, D. Delaware (1968); United States v. Blalock 255 F. Supp. 268

E.D. Pennsylvania (1966).

In Schneckloth v. Bustamonte 412 U.S. 218 (1973) the Supreme Court held that advising the subject of his Fourth Amendment rights was not a prerequisite to an effective consent search. Rather, "the question whether consent to search was in fact voluntary or was the product of duress or coercion, expressed or implied, is a question of fact to be determined from the totality of all the circumstances". id. at 20478. Knowledge said the court, of the right to refuse consent was a factor to be considered but not "the sine qua non of an effective consent". id. at 2051. A person cannot intelligently and voluntarily waive a right he does not know he has. cf. Miranda v. Arizona 384, U.S. 436 (1966).

A different result might also follow wher the accused is in custody at that time the consent was sort. See United States v. Luton 486 F2d 1021 (5th Cir. 1973); cf. United States v. Garcia 496 F2d 670 (5th Cir. 1974); United States v. Horton 488 F2d 374.

Here, Mr. Lewis allegedly told the Agents that there was a gun under the bed and another in his locked attache case, but he did not expressly consent to the search. The implied consent, if any, we maintain was involuntary.

Mr. Lewis was under arrest and was not advised that he had a right to refuse consent to search. Moreover, the

fact that the Agents had already searched the room would lead him to believe that they had authority to search. Under these circumstances, we submit, the implied consent was not given in an exercise of free will, but rather in peaceful submission to an exersion of authority by the FBI.

## POINT II

## CONFESSION MADE BY FRANK LEWIS AFTER HIS ARREST WAS INADMISSIBLE AGAINST ROBINSON QUINONES

We contend that the confession made by Frank Lewis after his arrest was inadmissible at the separate trial of Robinson Quinones.

This court has recently decided a case United States v. Floyd and Olivo, Doc. Nos. 76-1462, 76-1463, Nos. 666-667 May 16, 1977, which addressed itself to this issue. There a witness, Duffin, testified that the defendant, Olivo, told him that he and co-defendant, Floyd had robbed the bank. The court held that it was error to admit the statement at the joint trial of Olivo and Floyd. In reaching that result the court said:

> "The Government argues that the statement is admissible against Floyd because it was made by a co-conspirator during the course of and in furtherance of a conspiracy. Alternatively, the Government, citing Nelson v. O'Neil, 402 U.S. 622 (1971), contends

that Floyd was not prejudiced by the admission of the statement because Olivo testified and could have been examined as to his alleged admission. We do not agree with either of the Government's contentions.

The established rule is that once "the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment." Grunewald v. United States, 353 U.S. 391, 401-02 (1957); accord Wong Sun v. United States, 371 U.S. 471, 490 (1963); Lutwak v. United States 344, U.S. 604, 618-619 (1953); Krulewitch v. United States, 336 U.S. 440, 443-444 (1949). To rule otherwise "would for all practical purposes wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind co-conspirators." Grunewald, supra. 353 U.S. at 402. Krulewitch, Grunewald related cases create a barrier at the end of a conspiracy that we do not think should be breached to permit the inclusion of an event on the other side, no matter how proximate it may be to the conspiracy in time and place.

To include in the conspiracy an event, no matter how proximately related, occurring after the main objectives of a conspiracy have been accomplished would unnecessarily blur the relatively clear line drawn by the Supreme Court's decisions on this subject. Although it is a close question, we find Olivo's arson of getaway car to be outside the bounds of the conspiracy, and thus any statement made by Olivo in conjunction with that event would not be admissible against Floyd.

> In this regard we also think the Government's reliance on Nelson v. O'Neil, 402 U.S. 622 (1971), is misplaced. Nelson held that where a codefendant is available for cross-examination it does not violate the confrontation clause to admit out-of-court statements of the codefendant that implicate the other defendant. The Court did not hold that the hearsay problem was eliminated by the opportunity for cross-examination. It did not disturb the traditional distinction between the confrontation clause and the hearsay rule. See Dutton v. Evans, 400 U.S. 74, 82 (1970). There is no indication that any such blanket exception to the hearsay rule exists where the co-conspirator hearsay declarant is available for cross-examination. It was error to admit Duffin's statement as evidence against Floyd."

Although this court affirmed the conviction under the harmless error rule, the same result should not follow here.

The only direct evidence against the defendant in our case was the uncertain identification testimony of Mr. Casciano and Mr. Brown and the fact that Mr. Quinones used the name LaRossa. This testimony was also contradicted and explained by Mr. Lewis the defense witness. Accordingly, we submit that the confession of Mr. Lewis was not "a relatively small part of the picture."

The government introduced that testimony, together with the testimony of the two guns used in the robbery, which were found in Mr. Lewis' possession to prove guilt by association. That testimony also reduced the impact Mr. Lewis' testimony could have had on the jury and gave credience to the statement Mr. Quinones is alleged to have made at the time of his arrest.

We conclude that a different result could have followed had the testimony been excluded .

## POINT III

## THE COURT ERRED IN PERMITTING FBI AGENT FARRELL TO TESTIFY REGARDING OUT OF COURT EYEWITNESS IDENTIFICATION

Section 801 (d) (1) (c) of the Federal Rules of Evidence provides that:

> "(d) Statements which are not hearsay ---A statement is not hearsay if (1) Prior statement by witness -- The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is --- (c) one of identification of a person made after perceiving him;"

We concede that if Mr. Casciano, Mrs. Sharp and Mrs. Boyer testified at the trial they would be permitted under Rule 801 to testify regarding the out of court identification they made on a prior occasion. On the other hand, we contend that it was error to permit FBI Agent to testify to the out of court identification of others since:

1. He was not the declarant as required by Rule 801 (d) and

2. The declarant did not testify at the trial regarding his out of court identification and was not subjected to cross examination on that issue.

Rule 801 (d) (1) (c) by its language operates to allow only the testimony of the identifying witness and not persons present at the out-of-court identification. While we recognize an exception where the non identifying witness is used merely to bolster the identifying witnesses credibility. United States v. Miller 381, F2d 529, 538 (2 Cir. 1967); United States v. Barbate 284 F. Supp. 409 (E.D. N.Y. 1968) those cases did not face the hearsay question presented here.

In order to resolve the issue of the adequacy of cross examination and the right of confrontation this court should consider in addition to the reliability of the circumstances surrounding the prior identification, the use to which the testimony is being put, its significance to the case, the scope of the eyewitnesses direct examination and his testimony on cross examination. cf. United States v. Reed, 376 F2d 229, N.3 (7th Cir. 1967)

We concede that the Wade hearing had in this case established that the out of court identification was reliable. However, all other relevant factors point to the inadmissibility of such testimony.

First the testimony was not used to bolster the credibility of the witness but rather, by hearsay, to establish the fact of identification. Second, Agent Farrell's testimony of the prior identification was significant to the case. Mr. Casciano's in court identification was weak

and he did not testify in full regarding his out of court identification. Mrs. Sharp did not testify at the trial and there was no identification testimony regarding Lewis other than Agent Farrell's. The Stipulation regarding Mrs. Boyer read in pertinent part:

> "At that time a man whose picture she later identified rushed into the room and closed the door."

Mr. Quinones was not said to be the man (TR 143) but a picture of Mr. Quinones (Exhibit 11) was then exhibited to the jury without comment. (TR 144). The exhibit showed to Mr. Farrell was Exhibit 18.

Moreover, the scope of the direct conversation of Mr. Casciano regarding the prior photo identification was limited. He testified that he was shown a photo array and that he selected a picture of the man he recognized as Mr. LaRossa. He was not, however, asked to identify the picture he selected (TR 53-54) In view of the fact that he did not select a photograph of the defendant he was not cross examined on the subject.

Apparently due to the fact that Mrs. Sharp selected, at the previous trial of the defendant Lewis, a United States Marshal as one of the robbers, she was not called as a witness at Quinones trial.

As a result, we submit that Agent Farrell's testimony did not meet confrontation standards and was unduly prejudicial to the defendant.

## POINT IV

## COURT ERRED IN FAILING TO GRANT A MISTRIAL BASED UPON MR. DAVIS' IDENTIFICATION TESTIMONY

Mr. Davis was not presented as an identification witness at the Wade hearing held prior to trial. When asked if he could identify the defendant at trial he testified that:

> "Well, the man who is sitting at the table there. But the only thing, his picture looks just like him, but I'm not sure." (TR 133)

Counsel's motion for a mistrial was denied on the grounds that Mr. Davis did not have to be presented at the Wade hearing since "he didn't identify him from the photographs." (TR 134)

On cross examination, Mr. Davis testified that he was shown photographs on two occasions by FBI Agent Farrell. The first time in January, 1977, he was shown "a lot of pictures" and the last time a month before trial, he was shown "four or five". He then selected two of the photographs that he was shown. One of the two was a picture of the defendant. (TR 135-139)

Mr. Davis was then shown the photograph of the defendant that he said he selected and was asked on cross-examination:

> "So that what you're making an identification of; is that right?
>
> A: No, I am making an identification of the guy who stuck the gun to my head and said

'That's a stick up'. Thats the one and after I see this I go further with this one." (TR 136-137)

After the witness was excused the court, out of the hearing of the jury, said the following:

"THE COURT: I want to go back for one second to your motion for a mistrial.

It was my understanding from the representations made by Mrs. Schwartz and the testimony of Mr. Farrell, that the only person who made any identifications from the photospreads were Miss Sharp, I believe, he testified to, and that was of Mr. Lewis. And nobody else in the bank made any identification.

That was his testimony in the pretrial proceedings.

And it was his testimony also, as I recall it, at the last trial; and the testimony of this witness at the last trial.

That is the reason why I denied your motion for a Wade hearing.

After hearing this witness' testimony, I think if there was any error committed, assuming that he was shown and he did know--that there were inconsistent statements as to whether he made a positive identification from the photographs. And I think it was harmless because his testimony was quite spontaneous that he was not making the identification from any photograph he previously looked at. He remembered the face of the individual he saw in the courtroom.

So on that basis, I will deem your motion for a mistrial renewed and I will deny it again."

We submit that the court erred in failing to grant a mistrial or at the very minimum to hold a Wade hearing. Whenever the prosecution intends to offer eyewitness identification at trial, the defense is entitled to an evidentiary hearing to determine the circumstances of any pretrial identi-

fication and to challenge the admissibility of both the pretrial and the trial identification. Clemons v. United States 408 F2d 1230 (D.C. Cir. 1968). The hearing, of course, must be held out of the presence of the jury. United States ex rel Phillips v. Follette 428 F2d 912 (2 Cir. 1970)

## POINT V

## COURT ERRED IN ADMITTING TWO PISTOLS AND A SAWED OFF SHOTGUN INTO EVIDENCE

Two pistols and a sawed off shotgun, which were seized from the defendant, Quinones at the time of his arrest were admitted into evidence over defense objection. There was no proof whatever that these pistols were the ones used during the robbery. Moreover, there was no evidence whatever that a sawed off shotgun was used during the bank robbery.

After overruling the objection the court instructed the jury:

> "THE COURT: Ladies and gentlemen, without passing upon the question of whether these firearms are lawful or unlawful, or whether they are in the possession of anyone at this juncture, let me caution you that this defendant is not on trial for the possession of firearms. He is on trial for a bank robbery which the Government claims he and Mr. Lewis committed on January 3rd.
> Evidence of his possession of firearms, if they were in his possession and you so find, or other unlawful materials, if you find any

such to be the fact, is admissible for the purpose in this case of showing what he had in his possession at the time of the arrest.

If you find through all of the evidence that one or more of these possessions constitute a similar act type of crime or offense, then you may consider the evidence if you find additionally that the same constituted a part of a common scheme or plan.

I will give you full instructions on this at the conclusion of the case. Bear in mind, however, that this evidence in and of itself does not go to the proof of the bank robbery itself unless connected to the bank robbery through other evidence produced by the Government.

MR. O'BRIEN: I take exception to portions of your Honor's charge." (TR 225-226)

At the conclusion of the Government's case, the defense moved to strike the testimony regarding the guns as follows:

MR. O'BRIEN: "Your Honor, I have another motion to strike the testimony regarding the shotgun from the case. There has been no evidence used by the Government to connect that in any way or any other probative reason to have it into evidence.

I still maintain any similar motions on the guns but I think my motion is even much stronger on the shotgun, at least during the robbery there were hand guns and certainly there was no testimony regarding a shotgun.

It's highly prejudicial and I ask that it be stricken.

THE COURT: A sawed-off shotgun, as I see it--which is an illegal weapon similar to the weapon--I think comes in one the same basis."

We submit that this evidence, especially that relating to the sawed off shotgun was irrelevant and prejudicial in that it led only to the inference that the defendant has a propensity to commit crimes.

The pistol, which was not similar to the one used in the crime was irrelevant in that it led only to the inference about matters that were not properly provable in the case.

Rule 404 (b) of the Federal Rules of Evidence provides:

> "(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

We contend that the introduction of that testimony and the exhibits taken in conjunction with the court's charge, did exactly what Rule 404 (b) forbids. It proved the character of the defendant in order to show that he acted in conformity therewith.

Before evidence of identity or of common scheme or plan or prior similar acts becomes admissible the similiarity must be proved. As stated by McCormick Evidence §157:

> "To prove other like crimes by the accused so nearly identical in method as to ear mark them as the handiwork of the accused. Here much more is demanded than the mere repeated commission of crimes of the same class, such as repeated burglaries or thefts. The device used must be so unusual and distinctive as to be like a signature."

Certainly the crime of possession of a sawed off shotgun is not at all similar to the crime of bank robbery with a

pistol. That evidence was completely irrelevant and highly prejudicial. It was admitted we conclude, using the court's instruction to the jury "for the purpose in this case of showing what he had in his possession at the time of the arrest."

## POINT VI

## PROSECUTORS QUESTIONS REGARDING AN ATTEMPTED MURDER AND THE COURT CITATION FOR CONTEMPT OF THE DEFENDANT'S WITNESS DENIED THE DEFENDANT A FAIR TRIAL

During the cross examination of Mr. Lewis the prosecutor asked the following questions:

Q: "Now, Mr. Lewis, are you aware that you have been indicted by New York State?

A: Yes I am.

MR. O'BRIEN: Objection, Your Honor.

THE COURT: Strike it out.

MR. O'BRIEN: I ask that it be striken.

THE COURT: Yes, strike it out.

Q: Mr. Lewis, Mr. Lewis, did you participate in an attempted murder of a grand jury witness in the New York State case?

MR. O'BRIEN: Object to that, too.

THE COURT: Overruled.

A: I take the Fifth on grounds it might incriminate me.

Q: Do you know whether or not Mr. Quinones is involved in that as well?

MR. O'BRIEN: Objection, Your Honor, and I ask for a side bar, Your Honor.

THE COURT: The objection is sustained. The side bar is not necessary. Disregard it.

MR. O'BRIEN: I would ask Your Honor, I would ask the Court to admonish the jury --

THE COURT: I said to disregard the question.

MR. O'BRIEN: Your Honor, I would like to ask for a mistrial.

THE COURT: The motion is denied." (TR 337-338)

Despite the court's ruling the prosecutor again asked:

> "In the event that in the New York State cause you would be convicted of attempted murder, were you aware of what the penalties are for that crime?" (TR 339)

The court sustained the defense objection.

Prior to Mr. Lewis being called as a witness a hearing was held to determine whether Mr. Lewis would answer questions or invoke his self-incrimination privilege. At the conclusion of the hearing, the court found that the witness did not fully answer the questions posed and defense counsel disagreed.

The prosecutor then moved to preclude the witness from testifying. The court stated that it would have to sustain the prosecutor's motion since the witness intended to invoke the Fifth Amendment and would not answer questions.

The defense objected contending that such a ruling would deny the defendant his constitutional right to call

witnesses in his behalf. The defense suggested that the court should direct the witness to answer rather than preclude his testimony.

The court warned that if the defense insisted upon calling the witness the court would hold the witness in contempt in the presence of the jury. The defense objected to that procedure and requested that the court hold the witness in contempt in the jury absence. (TR 304-311)

The prosecutor then withdrew her motion and the following occurred in the jury presence:

Q: "Well, according to you, did you go into the bank?

A: Well, I was solely relying on the Court which found me guilty, you know, which clearly states that I got out of the limousine, I walked down here, I went into the Barclays Bank, I returned out of Barclays Bank and got into the limousine, according to the record I was found guilty, I am quite sure that you accept that as a fact, the Court --

THE COURT: Don't you want to tell the jury?

WITNESS: Well, it is recorded, sir.

THE COURT: You are under oath now. She asked a question, did you go into the bank or --

WITNESS: According to the record.

THE COURT: No, can't you answer that question yes or no?

WITNESS: According to the records I went into the bank and returned to the limousine.

THE COURT: Forgetting about the records, did you or didn't you?

WITNESS: The records got me 30 years, you know, the decision and investigations and considered, you know, that enough proof and whatnot, and according to, I will state it again, according to the records, according to the jury's return with a guilty verdict they found me guilty, clearly stated that I went intc the bank, came out of a limousine and returned to one.

BY MRS. SCHWARTZ:

Q: Mr. Lewis, it is quite clear what twelve people thought, but the question is according to your version of the facts did you or didn't you go into Barclays Bank on the morning of January 3rd?

A: Again I say according to a court of law it found me guilty indicating that I did go to Barclays Bank.

MRS. SCHWARTZ: Would your Honor instruct the witness to answer the question yes or no?

THE COURT: Answer the question, Mr. Lewis.

WITNESS: I am answering.

THE COURT: Answer the question yes or no, did you or did you not go into Barclays Bank on the morning of January 3rd?

WITNESS: Once again I will state --

THE COURT: Mr. Lewis, I will warn you now unless you give me a yes or no answer to that question the Court is going to hold you in contempt.

WITNESS: I'm trying to.

THE COURT: Answer the question yes or no.

WITNESS: Once again I say the records found me guilty of returning from the car from the Barclays Savings Bank.

The Court holds this witness in contempt of Court for refusing to answer the question.

Go on with the next question." (TR 351-353)

Q: Did Jose go into the bank with you?

A: According to my previous trial, which indicates that myself and another individual robbed the Barclays Bank, according to the decision of the jury and so forth.

MS. SCHWARTZ: Your Honor, I ask that the witness be directed to --

THE COURT: Did Jose go into the bank with you, yes or no?

WITNESS: Again, according to the records, according to the trial --

THE COURT: You understand I am going to hold you in contempt unless you answer that question yes or no?

WITNESS: I understand fully.

THE COURT: I hold you in contempt a second time." (TR 361)

Prior to the charge, the court offered a proposed instruction on the affect of the contempt citation on the witnesses credibility. The defense objected to the instruction and the court did not charge on the issue. (TR 382-383)

After the jury began it's deliberations, they sent the following note to the court:

"How does the contempt citation affect [Mr. Lewis'] credibility as a witness?" (TR 506

The court answered as follows:

THE COURT: "Now, with respect to the two contempt citations that the Court found

with respect to Mr. Lewis, you may, in your discretion use or not use such conduct in weighing such or giving such credence, if any, as you may wish to give Mr. Lewis' testimony on the matters as to which he testified in this case.

In other words, you may or may not, as you elect, choose to weigh such conduct in determining what credence, if any, you are going to give to his testimony."

THE PROSECUTORS QUESTIONS

It is anticipated that the government will concede that the prosecutors question, which advised the jury that the witness Lewis and the defendant Quinones were both accused of attempted murder, was error but that the error was harmless.

The leading case discussing harmless error is Kotteakos v. United States, 328 U.S. 750 (1946). The Court noted that distinctions should be drawn between criminal cases and civil cases, between strong cases and weak, between minor and major errors. Other factors to be considered are the number of errors in relation to the length of the trial, the prejudicial affect of the evidence and whether limiting instructions were given. The court concluded at 328 U.S. 750, 764 that the verdict may stand only if "the error did not influence the jury, or had but very slight effect."

The government's case against Mr. Quinones was far from overwhelming. The error committed by the prosecutor was egregious. The trial lasted only three days, during

which a number of errors, including the evidence regarding the sawed off shotgun, the hearsay identification testimony of Agent Farrell and the testimony of Mr. Davis, occurred. The testimony was highly prejudicial in that it showed that the defendant had a bad character and was a person likely to rob a bank. In addition, the court gave no limiting instruction at the time the question was asked other than to tell the jury to disregard it; a feat we contend was impossible.

Accordingly, we submit, the error had a significant influence upon the jury's verdict and requires reversal.

CITATION FOR CONTEMPT

Rule 608 of the Federal Rules of Evidence provides in pertinent part as follows:

> "The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self incrimination when examined with respect to matters which relate only to credibility."

Rules 609 provides in pertinant part:

> "(a) General rule-For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him ---but only if the crime (1) was punishable by death or imprisonment in excess of one year."
>
> - - - - -
>
> "(e) Pendency of appeal-The pendency of

> an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible."

On direct examination, Mr. Lewis refuted that portion of the government's case relating to Quinones being a passenger in the rented Cadillac and explained Quinones use of the alias LaRossa and his travel to Florida. No inquiry was made on direct as to whether Mr. Lewis robbed the bank.

On cross examination Mr. Lewis admitted that he was found guilty of that robbery, sentenced to 30 years and that his appeal on that conviction was pending. When specifically asked whether he robbed the bank he, in effect, invoked the Fifth Amendment by refusing to answer yes or no and stating, in substance, that he had been found guilty.

While it seems clear under Rule 609, that the pendency of an appeal will not bar an inquiry as to whether a witness was convicted, the pendency of the appeal would still permit the witness to invoke his Fifth Amendment rights for the crime of which he was convicted.

Nor can it be said that the witness waived his constitutional rights by taking the stand. The witness fuly answered all questions on cross examination on matters relating to his direct testimony and invoked the Fifth Amendment, as authorized by the last sentence of Rule 608, to matters which related to his credibility.

Even in the absence of Rule 608, the witness would not have waived his right merely by taking the stand. A witness has a right "not to answer questions calling for the disclosure of facts which would tend to incriminate him or provide a link in a chain of evidence usable against him in a subsequent trial." Note "Waiver of the Privilege Against Self-Incrimination" 14 Stan. L. Rev. 811, (1962) See. Hoffman v. United States 341 U.S. 479, 486; Blau v. United States 340 U.S. 159, 161 (1950)

The Standford Law Review further notes that the federal courts have been applying at least two differents tests to waiver. The first termed the "classic waiver" standard holds that "If the questions call for an answer which would reasonably increase the possibility of the witness's subsequent conviction of a crime it should be privileged." Or stated in the reverse "waiver occurs when the witness has admitted any incriminating fact and extends to all subsequent questions rendered innocuous as a result of the admission." id. at 815 Another standard announced in Rogers v. United States, 340 U.S. 367, (1951) stated that if a witness admits at least one element of a crime, waiver occurs and will extend to all related questions except those which would substancially increase the possibility of punishment. There was a strong dissent and the Seventh Circuit has expressed doubt "that the holding in Rogers

would be followed by the present Supreme Court. United States v. Chase 281 F2d, 255, 230 (7th Cir. 1960)

Regardless of which standard this court applies, the testimony of the witness in this case cannot constitute a waiver. He admitted only that he was in the vicinity at the time the bank was robbed and that he arrived there in a rented Cadillac. He further testified that he was there with Jose and that he travelled to Florida the next day with Quinones. With regard to this testimony he fully answered all questions on cross. He never admitted on direct that he robbed the bank, or was in the bank or that he received any money and he gave a completely innocuous reason for being in the vicinity at the time.

Accordingly, we submit that the court erred when it held him in contempt for refusing to answer yes or no when asked on cross whether he robbed the bank.

More importantly, even if the court was correct in holding the witness in contempt it was error to do so in the presence of the jury, to the defendant prejudice.

The witness, if believed, would clearly have exonerated the defendant. His credibility was, however, adversely affected by the contempt citation and the spill over effect upon the defendant is obvious. The jury's note regarding the affect of the contempt citation on the witness' credibility, makes it clear that the jury may have been willing

to accept that witness' testimony. Shortly after the court charged the jury on the affect of the contempt citation, the jury returned a verdict of guilty.

## CONCLUSION

The conviction of the defendant should be reversed and the case remanded for a new trial.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers LUTZ APPELLATE PRINTERS, INC.

**COURT OF APPEALS**
**SECOND CIRCUIT**

**UNITED STATES OF AMERICA,**
**Plaintiff-Appellee,**

*- against -*

**ROBINSON QUINONES,**
**Defendant-Appellant.**
**On Appeal from the U.S. Dist. Court for the Eastern District of New York**

*Index No.*

*Affidavit of Personal Service*

*STATE OF NEW YORK, COUNTY OF* *ss.:*

*I,* James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 112 West 136th Street; New York, New York

*That on the* **19th** *day of* **August** *19* **77** *at* **225 Cadman Plaza Brooklyn, New York** *upon*

*deponent served the annexed* **Appendix** **Brief**

**U.S. Atty Eastern District**
**David Trager**

*the* *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

*Sworn to before me, this* **19th**
*day of* **August,** *19* **77**

James A. Steele

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979